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IN THE

United States Supreme Court

October Term 1965

No. 435

HERMAN BERMAN, Individually and trading as SCOTT CONSTRUCTION COMPANY; FRANKLIN ELECTRIC COMPANY; MODERN FLOORS, INC.; JENKINS ELEVATOR AND MACHINE COMPANY; WESTINGHOUSE ELECTRIC SUPPLY COMPANY, (a division of WESTINGHOUSE ELECTRIC COMPANY); GENERAL ELECTRIC SUPPLY COMPANY, AND HOTPOINT (both divisions of GENERAL ELECTRIC COMPANY),

Petitioners,

v.

SEYMOUR HERRICK and ABRAHAM KAMBER, individually and trading as LEWIS TOWER BUILDING,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1965

NO.

HERMAN BERMAN, Individually and trading as SCOTT CONSTRUCTION COMPANY; FRANKLIN ELECTRIC COMPANY; MODERN FLOORS, INC.; JENKINS ELEVATOR AND MACHINE COMPANY; WESTINGHOUSE ELECTRIC SUPPLY COMPANY, (a division of WESTINGHOUSE ELECTRIC COMPANY); GENERAL ELECTRIC SUPPLY COMPANY, AND HOTPOINT (both divisions of GENERAL ELECTRIC COMPANY),

Petitioners,

v.

SEYMOUR HERRICK AND ABRAHAM KAMBER, individually and trading as LEWIS TOWER BUILDING,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Herman Berman, individually and trading as Scott Construction Company, Modern Floors, Inc., Jenkins Elevator and Machine Company, Westinghouse Electric Supply Company, General Electric Supply Company, and Hotpoint, petitioners, pray that a writ of certiorari

issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above entitled case on May 11, 1965.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court, printed in appellants' appendix, pp. 221a-230a is reported in 231 F. Supp. 918 (1964). The opinions, orders and judgment of the Circuit Court of Appeals, printed in appendix hereto, infra, pp. 14 - 17 are reported in F.2d (1965).

JURISDICTION

The judgment of the Circuit Court of Appeals was entered in May 11, 1965. Rehearing was denied on June 10, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

1. May the Circuit Court of Appeals sanction fundamental error attributable to the district court judge, who halted abruptly all further cross-examination of a crucial witness, with a statement that is not necessary to consider the underlying equities of the case because plaintiffs had failed to present enough evidence to sustain an award of damages?

2. May the Circuit Court of Appeals ignore the entire line of decisions in the Commonwealth of Pennsylvania dealing with unjust enrichment in reaching the conclusion that regardless of the facts and equities of the case, the plaintiffs' proof on the issue of enrichment was insufficient to sustain an award of damages, when plaintiffs allege and prove facts sufficient to warrant a finding of fraud.

STATEMENT OF THE CASE

This is an action based on the quasi-contractual theory of unjust enrichment by several contractors and materialmen against the general partners of a limited partnership which owned a large Philadelphia office building. The plaintiffs seek to recover the value of the improvements to the building made by them pursuant to their contracts with defendants' lessee, a corporation which was in possession of the building at the time the improvements were made.

The plaintiffs contend that the conduct of an individual who was both the general manager of the limited partnership which owned the building and president and substantial stockholder (these shares were obtained for a nominal consideration) of the corporation which leased the building provided an equitable basis for imposing a liability upon the owners of the building who are the defendants in this case.

The evidence produced shows that the lessee had contracted to pay the plaintiffs sums aggregating approximately $240,000 for labor and material, but paid them only $130,000 leaving an unpaid balance of approximately $110,000. Thereafter, the lessee defaulted upon its obligations to lessor under the lease and the latter terminated the leasehold. A few months later finding the party with whom they had contracted insolvent, and the owners in the possession of the building, the plaintiffs filed this suit against the owners of the building for the cost of their improvements.

The case was tried by a court sitting without a jury. During the trial, the court halted abruptly all cross-examination of one of defendant's most important witnesses, an attorney who represented both the defendants and the individual who was the general manager of

the defendants' partnership, and president and 50 percent owner of the stock of the lessee corporation.

When the trial concluded, the court found no factual basis for the plaintiffs' claim that a relationship existed between the defendants and that individual sufficient to impose a liability upon the defendants under the theory of unjust enrichment.

The matter was appealed to the Court of Appeals for the Third Circuit and the plaintiffs claimed that: (1) the trial court did not properly apply Pennsylvania law (2) the trial court's findings were clearly erroneous in view of the undenied testimony presented at the time of trial and (3) the trial court committed fundamental error in halting all cross examination of the witness for the defense whose testimony was crucial to the issues involved.

The Court of Appeals, in its opinion, categorically refused to consider the errors during the trial of which plaintiffs complained since that court stated:

> "the plaintiffs' proof on the issue of enrichment was insufficient to sustain an award of damages."

The plaintiffs filed a petition with the Court of Appeals for re-hearing, stating in detail where that court had misapplied the Pennsylvania law, a ruling which in effect emasculated the entire doctrine of an unjust enrichment as promulgated in Pennsylvania court decisions. Plaintiffs also reminded the court that fundamental error had been committed during the trial of the case when the trial judge improperly halted all plaintiffs' cross examination of a crucial witness for the defendants. The petition for re-hearing was denied. This petition for certiorari is taken

seeking review of the ruling of the Court of Appeals denying the petition for re-hearing and the affirmation of the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

1. The proceedings in this case have departed from the accepted and usual course of judicial proceedings in the Third Circuit when the right of cross examination was denied counsel for the plaintiff. The Court of Appeals while admitting by implication such a denial existed sanctioned it by stating in its opinion that the equities of the case need not be considered because of a purported omission in the plaintiffs' case regarding proof of damages which holding is contrary to applicable Pennsylvania decisions.

2. The Circuit Court of Appeals has rendered a decision that is in such conflict with applicable Pennsylvania decisions that this decision effectually destroys the law of unjust enrichment in Pennsylvania which has been carefully built up by Appellate Court decisions in Pennsylvania, based on the Restatement of Restitution.

DISCUSSION OF REASONS FOR GRANTING WRIT

1. The Circuit Court erred in not granting a new trial for the reason that fundamental error was committed during the trial of this case by the trial judge who abruptly halted all of plaintiffs' cross examination of a crucial witness for the defendants.

The basic right of any party is the right to cross examine an opposing party's witness. The denial by a court of this right to any party is fundamental error.

Alfred v. United States, 282 U.S. 687 (1930). The District Court during the trial of this case stopped all cross examination of a crucial witness for the defense. The court then compounded this error by relying on this witness's testimony to support its findings of facts.. Cross examination was never completed because of the following discussion, taken from the record at page 209a.

> "THE COURT: We have had enough of this cross-examination. We will stop at this point.
> MR. LASHNER: Exception, Your Honor.
> THE COURT: Yes.
> MR. GOFFMAN: Are you finished?
> MR. LASHNER: Yes.
> MR. GOFFMAN: Do you have any other areas of cross-examination? I don't think His Honor intended to cut you off.
> THE COURT: Yes, I did" (R209a).

(Plaintiffs' counsel's affirmative reply to defendants' counsel's [Mr. Goffman's] question that he was finished was made only in obedience to the ruling of the court stating that all further cross examination was prohibited.)

This ruling by the court was fundamental error. Even defendants' attorney recognized this and tried to influence the court to change its ruling. The trial judge remained adamant.

Of course, the bounds of proper cross examination are within the sound discretion of the trial judge, and the nature and character of the investigation of the subject under consideration and the demeanor of the witnesses are prime factors entering the court's determination of proper limits. But it is clear that in this case the court exceeded all proper limitation of cross-examination by prohibiting all further cross-examination of a witness on which he subsequently relied to substantiate his findings of fact. This reliance on the testimony of this crucial witness compounded the severity of the fundamental error committed at the time of trial which can be cured only by the granting of a new trial.

The Circuit Court in effect admitted that fundamental error was committed but stated in justification thereof:

> "...The plaintiffs' proof on the issue of enrichment was insufficient to sustain an award of damages and, therefore, we find it unnecessary to consider the underlying equities of the case."

With this statement the Court of Appeals by indirection approved the fundamental error committed by the court below. To compound its error the Circuit Court improperly quoted Pennsylvania Law on the issue of proof of damages.

2. The Circuit Court did not apply Pennsylvania law to the factual issues of this case and rendered a decision that is in such conflict with that applicable Pennsylvania law that this Court's decision effectively destroys the law of unjust enrichment in Pennsylvania which has been carefully erected by Court decisions which have relied heavily and are in accord with the Restatement of Restitution.

The Court erred in holding that the plaintiffs' proof, on the issue of unjust enrichment, was insufficient to sustain an award for damages because the major basis for the Circuit Court's opinion is not consistent with Pennsylvania Law or with the holding in the case on which it relied. Meehan v. Cheltenham Township, 410 Pa. 446, 189 A.2d 593 (1963).

The Supreme Court of Pennsylvania in that case stated at 450: (and the Circuit Court quoted from that opinion)

> "Where one party has been unjustly enriched at the expense of another, he is required to make restitution to the other. In order to recover, there must be both (1) an enrichment, and, (2) an injustice resulting if recovery for the enrichment is denied . . . . In any event, appellant cannot merely allege its own loss as the measure of recovery—i.e., the value of labor and materials expended—but instead must demonstrate that appellee has in fact been benefited."[5]

This court adopted that holding, but did not see fit to adopt the footnote to that specific holding. Footnote 5 after the word "benefited" in the Supreme Court's opinion states this:

"5 Where the value of the benefit differs from the amount of the loss, and the recipient is free from fault, the amount of recovery is generally limited by the value of the benefit. See Restatement, Restitution §1, comment e (1936)." (Emphasis supplied.)

Section 1, comment e of the Restatement, Restitution provides:

"e. Where benefit and loss do not coincide. There are situations, however, in which a remedy is given under the rules applicable to this subject, where the benefit received by the one is less than the amount of the loss which the other has suffered. In such a case, if the transferee was guilty of no fault, the amount of recovery is usually limited to the amount by which he has been benefited. Thus, if a person's chattels are incorporated into the land of another without the other's knowledge, the owner of the land is liable, if at all, only to the extent to which its value has been increased, although the value of the chattels was greater (see s42). The amount of recovery, however, is not invariably determined by the value of what has been received. In some cases the value of what is given is determinative, as where, because of fraud or breach of contract, services or chattels are given, the value of which is greater than the amount by which the recipient's estate has been increased (see §§151 and 152)." (Emphasis supplied.)

Further section 151 of the Restatement of Restitution states that:

> "Where a person is entitled to a money judgment against another because by fraud, duress or other consciously tortious conduct the other has acquired, retained or disposed of his property, the measure of recovery for the benefit received by the other is the value of the property at the time of its improper acquisition, retention or disposition, or a higher value if this is required to avoid injustice where the property has fluctuated in value or additions have been made to it."

Section 152 of the Restatement of Restitution states that:

> "Where a person is entitled to restitution from another because the other has obtained his services, or services to which he is entitled, by fraud, duress or undue influence, the measure of recovery, for the benefit received by the other is the market value of such services irrespective of their benefit to the recipient."

This is the law of Pennsylvania. DeGasperi v. Valicenti, 198 Pa. Super. 455 (1962).

In the Meehan case it was admitted that the recipient of the benefit was free of any fault. On the other hand the basis of the plaintiffs' case is that the defendants were parties to the entire scheme and by their action through their agent caused these improvements to be made. Allegations to this effect were made and proof was submitted at the time of trial. Therefore, the instant case differs factually from the Meehan case on which the Circuit Court relied. The Circuit Court, in effect, stated a concept of law which the Pennsylvania Courts do not accept and which destroys the

basic concepts of the unjust enrichment doctrine that have been carefully erected by Pennsylvania judicial decisions.

Further, plaintiffs submitted in detail proof of their damages conforming to the standards set forth in previous Pennsylvania decisions.

CONCLUSION

All of the above argument was presented to the Circuit Court of Appeals either in the brief for appellants at argument or in the petition for rehearing. The Circuit Court rejected these arguments twice. By implication they have stated that the halting of all cross examination is proper. By specific decision they have enunciated a theory of law that is directly contrary to law of Pennsylvania. The District Court denied the plaintiffs their right to a day in court. The Circuit Court has affirmed that denial and compounded that error with reasons that are directly contrary to Pennsylvania law. For these reasons petitioners request that this court grant its petition for certiorari.

Respectfully submitted,

SAMUEL SACKS,
MELVIN LASHNER,
Counsel for petitioners

ADELMAN & LAVINE,
Of Counsel

Certificate of Counsel

We hereby certify that the foregoing petition is presented in good faith and not for delay.

SAMUEL SACKS
MELVIN LASHNER
Counsel for petitioners

APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

(Filed May 11, 1965)

Argued March 16, 1965

Before: McLaughlin, Hastie and Smith, Circuit Judges.

By Hastie, Circuit Judge.

This is a suit, based solely upon the quasi-contractual theory of unjust enrichment, by several contractors and materialmen against the general partners of a limited partnership, which owned a large Philadelphia office building. Plaintiffs seek to recover the value of alleged improvements to the building made by them pursuant to their contracts with the defendants' lessee, a corporation which was then in possession of the building with an option to purchase it.

There was evidence that the lessee had contracted to pay the plaintiffs sums aggregating approximately $240,000 for labor and material. It paid them about $130,000, leaving an unpaid balance of about $110,000. The lessee defaulted upon its obligations to the lessor, and the latter lawfully terminated the leasehold. A few months later, finding the party with whom they had contracted insolvent, the plaintiffs filed this suit against the owners of the building. Subsequently, the defendants sold the building and in so doing sustained a loss of more than $800,000. This litigation involves no assertion of liens or rights in rem. Only a personal obligation of the defendants is claimed.

The case was tried to a court sitting without a jury.

On all of the evidence the court found no proper factual basis for the claim that, as between the contractors and the landlords, the latter had been unjustly enriched by the work done on their building solely at their lessee's behest and in reliance upon its promise to pay. On this appeal the contractors contend that the conduct of an individual, who was both a limited partner of the landlord partnership and a major stockholder and active participant in the ill-fated venture of the corporate lessee, provided an equitable basis for imposing personal liability on the landlords for any benefit they derived from the plaintiffs' work. The defendants contend both that the court was right in finding no equity in the plaintiffs' claim and that the plaintiffs failed to prove either the fact or any amount of the alleged "enrichment". We agree with the defendants that the plaintiffs' proof on the issue of enrichment was insufficient to sustain an award of damages and, therefore, we find it unnecessary to consider the underlying equities of the case.

This is a diversity case arising out of Pennsylvania transactions, and Pennsylvania law determines what must be proved to sustain an award for unjust enrichment. In the recent case of Meehan v. Cheltenham Township, 1963, 410 Pa. 446, 189 A.2d 593, the Supreme Court of Pennsylvania denied recovery to a subcontractor against a landowner on the ground that the amount of the alleged economic benefit to the landowner, if any, had not been proved. The Court said:

> "Where one party has been unjustly enriched at the expense of another, he is required to make restitution to the other. In order to recover, there must be both (1) an enrichment, and (2) an injustice resulting if recovery for the enrichment is denied. . . . In any event, appellant cannot merely allege its own loss as

> the measure of recovery—i.e., the value of labor and materials expended—but instead must demonstrate that appellee has in fact been benefited." 410 Pa. 446, 449-450, 189 A.2d 593, 595.

Equally clear and to the same effect is the ruling in West v. Peoples First National Bank & Trust Co., 1954, 378 Pa. 275, 286, 106 A.2d 427, 433, that recovery for unjust enrichment "is limited to the value of the benefit to the other party derived from the performance . . . even though the sums expended or the value of the services rendered may be greater than the amount of such benefit conferred".

In the present case the plaintiffs undertook to prove the fair price of the work they performed, rather than how much the value of the building was increased by their labor and the materials they supplied and installed. They introduced in evidence their bills rendered to the lessee for various contractual undertakings; some for maintenance operations, others for such improvements as air conditioning units, and still others for renovations and subdivisions of space and the installation of special facilities to meet the needs of individual tenants. There was no evidence of any amount or amounts by which the value of the building was increased as a result of any of these undertakings. In this connection, it seems unlikely that the cost of continuing elevator maintenance, one of the items in evidence, added in any significant way to the value of the structure. The same is true of renovations, and partitioning and special installations to meet the specialized needs of particular tenants. On the other hand it seems likely that the "modernizing" of elevators and the installation of a number of air conditioning units resulted in some increase in the value of the building. And even though the defendants sold the building at a sub-

stantial loss, that loss might well have been greater except for some of the improvements in suit. However, on the present record the dollar value of any such economic benefit, and the extent of the contribution of any plaintiff's work to it, are wholly speculative. Thus, the plaintiffs' proof is inadequate to support any verdict in their favor under the above cited Pennsylvania rule that it is the benefit of work to the defendant, not the amount the plaintiff reasonably charged for its performance, which is recoverable in this kind of action.

Finally, we have not overlooked the plaintiffs' argument that rental income for the building increased $5000 per month as a result of their work. The record shows such an assertion in the opening statement of plaintiffs' counsel, and the trial judge alluded to this assertion in his opinion. But there is no proof that this occurred and, therefore, no basis for a finding in the plaintiffs' favor on the alleged increase in rental value.

Accordingly, the judgment will be affirmed.

A True Copy:

Teste:

Clerk of the United States
Court of Appeals for the
Third Circuit.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Present: McLaughlin, Hastie and Smith, Circuit Judges.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court filed July 6, 1964 in this case be, and the same is hereby affirmed, with costs.

ATTEST:

IDA O. CRESKOFF

Clerk

May 11, 1965

SUR PETITION FOR REHEARING

Present: BIGGS, Chief Judge; and McLAUGHLIN, KALDNER, STALEY, HASTIE, GANEY, SMITH, and FREEDMAN, Circuit Judges.

The petition for rehearing filed by Herman Berman, Individually and Trading as Scott Construction Co., Et Als., Appellants, in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

s/ William H. Hastie
Circuit Judge

Dated: June 10, 1965

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HERMAN BERMAN, Individually and Trading as SCOTT CONSTRUCTION COMPANY, et al.,
Petitioners,

v.

SEYMOUR HERRICK and ABRAHAM KAMBER, Individually and Trading as LEWIS TOWER BUILDING,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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September 3, 1965.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1965.

No. 435.

HERMAN BERMAN, INDIVIDUALLY AND TRADING AS SCOTT CONSTRUCTION COMPANY, ET AL.,
Petitioners,

v.

SEYMOUR HERRICK AND ABRAHAM KAMBER, INDIVIDUALLY AND TRADING AS LEWIS TOWER BUILDING,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

OPINIONS BELOW.

The opinion of the District Court is reported at 231 F. Supp. 918. The opinion of the Court of Appeals for the Third Circuit (App. of Petition) is reported at 346 F. 2d 116.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED.

1. In a trial without a jury does the refusal of the Court of Appeals to consider the procedural question of the proper exercise by a district court of its discretion in stopping cross-examination of one of defendants' witnesses, constitute fundamental error where the Court of Appeals' decision is based on another valid and totally independent ground.

2. Did the Court of Appeals properly apply the Pennsylvania decisional law as to damages in an unjust enrichment case to the facts of this case.

STATEMENT OF THE CASE.

This is a diversity action between contractors and materialmen and the owners of a Philadelphia office building (R. 221a). The plaintiff-petitioners supplied labor and material to L. T. B. Company, a Pennsylvania corporation, which was the tenant of the Lewis Tower Building, an office building in Philadelphia (Petition, p. 14). They had no agreements of any kind with the defendants-respondents Seymour Herrick and Abraham Kamber who were then the owners of the building, nor did they rely upon them in any way (R. 221a, 228a, 229a). Nevertheless, plaintiffs attempted in this law suit to impose liability on the defendants for tenant-L. T. B.'s debts under the theory of unjust enrichment (Petition, p. 3).

The case was tried by a court without a jury. The district court found no proper factual basis for the claim that the landlord-defendants had been unjustly enriched by the work done on their building by the plaintiffs at the request of the tenant, L. T. B. Company, and in sole reliance upon its promise to pay (Petition, p. 15). The district court expressly refused to find that the conduct of an individual who was both a limited partner of the defendants

and a stockholder and participant in the activities of the corporate tenant, L. T. B. Company, provided an equitable basis for imposing liability on the defendants for any benefit they derived from plaintiffs' work (R. 226a, 227a, 228a).

On appeal to the Court of Appeals for the Third Circuit, plaintiffs contended that the district court's findings were erroneous and that the district court committed error in stopping cross-examination of one of defendant's witnesses. The Court of Appeals unanimously affirmed the judgment of the district court, basing its decision on the ground that plaintiffs' proof on the issue of enrichment was insufficient to sustain an award of damages. The Court of Appeals expressly declined to consider the underlying equities of the case; having found no enrichment it was unnecessary to decide whether an injustice would result if recovery was denied.

ARGUMENT.

Plaintiffs seek review in this Court of two questions:

(a) First, they contend that the Court of Appeals sanctioned fundamental error committed by the district court in halting the cross-examination of a "crucial witness";

(b) Secondly, they contend that the Court of Appeals ignored the entire line of decisions in the Commonwealth of Pennsylvania dealing with unjust enrichment.

It is obvious that both of these contentions relate solely to the conduct of the instant trial and to the facts presented in that trial. The applicable cases make it clear that the determination as to the proper latitude to be allowed to counsel on cross-examination and the application of the doctrine of unjust enrichment depend—although in different ways—upon the particular facts of the individual case.

1. Cross-Examination.

This Court has held that "the extent of cross-examination. . . is within the sound discretion of the trial court." *Alford v. United States*, 282 U. S. 687, 694, 51 S. Ct. 218, 220 (1931). Under *Alford* and the cases following it, the test to be applied is whether a district court has abused its discretion. While recognizing this principle, plaintiffs argue that the trial court "exceeded all proper limitation of cross-examination by prohibiting all further cross-examination of a witness . . ." (Petition, p. 8). Examination of the record belies this assertion.

The witness in question was Arthur Feinstein, a witness for the defendants. He was asked seven questions covering two pages on direct examination (R. 181a-182a).

His cross-examination covered four subjects and twenty-eight pages of the record (R. 182a-209a). After these subjects were explored in minute detail, the district court ended the cross-examination (R. 209a). On re-cross-examination one question was asked which was obviously a continuation of plaintiffs' original cross-examination (R. 210a). Further cross-examination was stopped by plaintiffs' counsel on his own initiative.

Although plaintiffs now assert, and asserted in the Court of Appeals, that Mr. Feinstein's credibility was a crucial issue in the case, no factual basis for this assertion appears either in the record, in plaintiffs' brief in the Court of Appeals, or in their Petition to this Court. In view of the repetitious nature of the cross-examination and the failure of plaintiffs' counsel to indicate to the trial judge that other areas of inquiry had not yet been explored, the district court's ruling was clearly correct.

More importantly, the Court of Appeals did not rule on the issue to which this cross-examination was directed. While plaintiffs read the Court of Appeals' opinion as an admission that fundamental error was committed by the district court, its opinion is not susceptible of that interpretation. The Court of Appeals stated:

> "We agree with the defendants that the plaintiffs' proof on the issue of enrichment was insufficient to sustain an award of damages and, therefore, we find it unnecessary to consider the underlying equities of the case." (Petition, p. 15)

The Court's statement should be taken at face value. Its failure to consider any issue but that of enrichment and of evidence presented in connection with that issue cannot be equated with an expression of opinion on any other issue and certainly cannot be construed as an adverse opinion. It would be a useless expenditure of judicial time for this Court to review an issue which was unnecessary to the decision below.

2. Conflict With State Law.

The plaintiffs have asserted that the Court of Appeals' decision is in such conflict with applicable Pennsylvania decisions as to destroy the law of unjust enrichment as enunciated by the Pennsylvania courts (Petition, p. 6). This assertion is not supportable.

The Pennsylvania Supreme Court has held that in order for a plaintiff to recover on the theory of unjust enrichment, he must prove both enrichment and an injustice resulting if recovery for the enrichment is denied. *Meehan v. Cheltenham Township,* 410 Pa. 446, 449, 189 A. 2d 593, 595 (1963). The "enrichment" is measured not by the plaintiff's loss nor by the value of labor and material expended by plaintiff, but by the benefit received by the defendant. *Meehan v. Cheltenham Township, supra* at 450, 189 A. 2d at 595-96; *West v. Peoples First National Bank & Trust Co.,* 378 Pa. 275, 286, 106 A. 2d 427, 433 (1954). Applying this principle to the testimony in this case, the Court of Appeals held "that the plaintiffs' proof on the issue of enrichment was insufficient to sustain an award of damages" (Petition, p. 15); "there was no evidence of any amount or amounts by which the value of the [defendants'] building was increased as a result of any of these [plaintiffs'] undertakings" (Petition, p. 16).

Plaintiffs dispute the Court's reading of Pennsylvania law. They argue that plaintiffs may recover the amount reasonably charged by them for their work irrespective of the benefits received by the defendants. They claim that this is the appropriate rule to be applied by reason of a footnote in the *Meehan* case, *supra,* and the Restatement section cited in this footnote. From these sources the plaintiffs argue that the rule applied by the Court of Appeals is not applicable in this case.

The footnote and the Restatement section cited both indicate that the amount of recovery *may* be measured by the value of the plaintiffs' work *if* the recipient is guilty of fraud or breach of contract. In that event—and only in

that event—would the value of labor and material supplied by plaintiffs be relevant. There is no dispute as to the existence of this principle. However, in order for it to apply plaintiffs must have proved either breach of contract or fraud. Since there was admittedly no contract between the plaintiffs and the defendants (Petition, p. 3), plaintiffs cannot rely upon breach of contract. Although plaintiffs alleged in their complaints that defendants were parties to a scheme to have plaintiffs improve their building, there was no proof presented by plaintiffs to support this allegation and the district court categorically refused to so find. Furthermore, it held "there is no basis for imputing to the defendants knowledge of, or acquiescence in, this [L. T. B.'s] overambitious program of improvements" (R. 228a).

This case involves solely the application of the general principles of the doctrine of unjust enrichment as laid down by the Pennsylvania courts to the particular facts of this case. Indeed the Pennsylvania courts have stated that: "On questions of this nature [unjust enrichment] no two cases are alike. Each case rests upon its own peculiar facts and the general principles relative thereto." *Farmers National Bank v. Albertson,* 203 Pa. Super. 205, 211-12, 199 A. 2d 486, 489 (1964).

Plaintiffs' argument, in substance, is no more than that this case was improperly decided on its facts. This is confirmed by the final assertion in plaintiffs' argument where they contend that they submitted in detail proof of their damages conforming to the standards set forth in previous Pennsylvania decisions (Petition, p. 12). The Court of Appeals held to the contrary.

The doctrine applied by the Court of Appeals is directly and correctly drawn from the applicable Pennsylvania decisions. The determination by the Court of Appeals on questions of local law has ordinarily been accepted by this Court. *General Box Co. v. United States,* 351 U. S. 159, 165, 76 S. Ct. 728, 732 (1956); *Ragan v. Merchants*

Transfer & Warehouse Co., 337 U. S. 530, 534, 69 S. Ct. 1233, 1235 (1949). It should be accepted here and certiorari should not be granted. Cf. *Wolf v. Weinstein*, 372 U. S. 633, 636, 83 S. Ct. 969, 972 (1963).

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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